In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-718

BANGOR PUNTA OPERATIONS, INC. AND BANGOR PUNTA CORPORATION, PETITIONERS

v.

BANGOR & AROOSTOOK RAILROAD COMPANY AND BANGOR INVESTMENT COMPANY, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the District Court is reported at 353 F. Supp. 724 (D. Me. 1972) (App. 30–41). The opinion of the Court of Appeals for the First Circuit is reported at 482 F. 2d 865 (App. 54–67).

JURISDICTION

The petition for a writ of certiorari was granted on January 7, 1974. The judgment of the Court of Appeals was entered on August 3, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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STATUTES INVOLVED

The applicable sections of the Clayton Act, Securities Exchange Act of 1934, and the Interstate Commerce Act are set forth in Petitioner's Appendix (App. A–1–A–9).

QUESTION PRESENTED

Whether a railroad has standing to bring an action in its own name against a former holding company which has the effect of vindicating the public interest.

STATEMENT

The Bangor and Aroostook Railroad Company (BAR) and its wholly owned subsidiary, Bangor Investment Company (BIC), brought suit against the Bangor Punta Corporation (Bangor Punta) and its wholly owned subsidiary, Bangor Punta Operations (BPO) in the District Court for the District of Maine. Bangor Punta, a diversified holding company, through its subsidiary BPO, formerly held a majority interest in, and controlled BAR. At the time BAR brought the action against its former holding company, Bangor Punta, BAR was substantially owned and controlled by Amoskeag Company, another investment company.

In 1971, the Bureau of Accounts of the Interstate Commerce Commission, after a study of the intercorporate financial transactions between the BAR and its former holding company, forwarded a report to the Commission, *Report of Diversified Holding Company Relationships And Transactions of Bangor Punta Corporation.* After analyzing certain intercorporate

transactions, the Bureau recommended that steps be taken to have the former holding company make restitution to the railroad for misappropriation of the carrier's assets.

In June of 1971, the Chairman of the Surface Transportation Subcommittee, Senate Committee on Commerce, requested that the Commission furnish the Committee with all the information gathered by the Commission on conglomerate mergers in the rail industry. The Bangor Punta study, along with other information and studies, was forwarded to the Committee.

Sometime thereafter the Board of Directors of BAR obtained the study, and after deliberation, authorized the chief executive officer of BAR to institute action against Bangor Punta and BPO in the name of BAR. The complaint sought damages for misappropriation and waste of corporate assets, and was brought both under the common law of Maine, and under various Federal statutes (see App. 2a).

The district court granted defendant Bangor Punta's motion for summary judgment dismissing the complaint (App. 1a–12a). The district court held that the present owner of the railroad, the Amoskeag Company, is the real party in interest and would be the real beneficiary of the proceeds of the suit. The court concluded that since Amoskeag was a subsequent purchaser, it was "barred from maintaining a derivative suit on behalf of BAR for the wrongs alleged to have occurred before Amoskeag purchased its BAR shares" (App. 4a).

On appeal, the First Circuit sent the matter back to the district court to be determined on its merits. In sending the matter back, the court held that the public's interest inherent in viable railroads is sufficient to provide standing for the Bangor & Aroostook—apart from Amoskeag's interest—to maintain the action. As the First Circuit stated (App. 19a-20a):

> The public's interest, unlike the private interest of stockholder or creditor, is not easily defined or quantified, yet it is real and cannot, we think, be overlooked in determining whether the corporation, suing in its own right, should be estopped by equitable defenses pertaining only to its controlling stockholder. Here we think the public's interest in the financial health of BAR provides a separate interest, quite apart from Amoskeag's, which is served by the corporate cause of action. Thus, regardless of the latter's motivations or potential receipt of undeserved benefits, BAR should be permitted, and indeed has a duty, to recover for itself any assets which were divested from it in violation of state or federal law. (Footnote omitted.)

Thus, in finding the public's "real, if inchoate interest" (App. 24a) sufficient to provide BAR standing to maintain the suit in its own name, the circuit court remanded the matter to be determined on its merits.

In their Brief to this Court, the petitioners argue *inter alia* that the circuit court erred in recognizing the railroad's standing to maintain an action which would redound to the public interest because of some

alleged ability of the Interstate Commerce Commission to protect the public interest in this type of a situation (Br. p. 15).

ARGUMENT

I

THE INTERSTATE COMMERCE COMMISSION HAS NO JURISDICTION OVER ONE-RAILROAD HOLDING COMPANIES

Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2) (a copy of which is attached) is the section which vests the Commission with authority to approve mergers or acquisitions of rail carriers. Section 5(2)(a)(i) makes Commission authorization necessary for "a person which is not a carrier to acquire control of two or more carriers though ownership of their stock or otherwise." Commission authority is also necessary when a single-railroad holding company attempts to acquire control of a second railroad.

Section 5(3) of the Act, 49 U.S.C. § 5(3) (also attached as an appendix hereto) authorizes the Commission to designate a non-carrier as a carrier and subject it to certain requirements. Section 5(3) provides in part that "[w]henever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier * * *"

Thus, in cases such as one here where a railroad generates its own holding company, that holding com-

pany escapes the Commission's regulation.[1] Furthermore, even assuming the Commission had jurisdiction over Bangor Punta as a designated carrier, it is still questionable whether the Commission could have regulated the intercorporate transfer of assets complained of by BAR. Under section 5(3), when a person is designated a carrier it is subjected to sections 20(1)–(10) and 20a of the Act, 49 U.S.C. §§ 20(1)–(10), 20a. Section 20 deals with the records, reports, and accounts to be kept by carriers. Section 20a subjects to the Commission's jurisdiction the carriers' issuance of securities. But "securities," as defined by section 20a(2), does not embrace intercorporate asset transfers or advances to or from affiliates.

That question aside, however, both the Commission and its two overseeing committees of Congress recognize the present gap in the Commission's regulatory authority. See hearings on *Failing Railroads,* before the Senate Commerce Committee, Serial No. 91-90, p. 166 et seq. (1970), and hearings on *Emergency Rail Services Legislation* before the Subcommittee on Transportation and Aeronautics, House Committee on Interstate and Foreign Commerce, Serial No. 91-86, pp. 199 et seq. (1970). Presently pending before

[1] In addition to the clear case, as here, of the lack of jurisdiction over a a single-railroad holding company, the Commission has consistently held that, under the statute, it lacks jurisdiction over holding companies which control a single integrated railroad system, or "single established carrier system." See e.g. *Louisville & J.B. & R. Co. Merger*, 295 I.C.C. 11 (1955); *Kansas City Southern Industries, Inc.—Control—Kansas City Southern Ry. Co.*, 317 I.C.C. 1 (1962).

both Houses are Bills to extend the Commission's regulation to conglomerate holding companies, S. 2460, introduced on September 20, 1973; H.R. 11092, introduced October 24, 1973.

It is clear that, contrary to petitioners' arguments, the Commission was not empowered to protect the public interest in the intercorporate dealings which are the subject of the instant controversy. This lack of regulatory authority, in part, necessitates the position taken by the First Circuit.

II

THE COURT ACTED PROPERLY IN HOLDING THAT THE RAILROAD HAD STANDING TO BRING THIS ACTION

The petitioners argue that the First Circuit disregarded *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). This is not an action brought by a party claiming representative status to vindicate a public interest. Nor is it a derivative suit brought by Amoskeag. Rather, the suit was commenced by the Bangor & Aroostook Railroad in its own name.[2]

The continued financial health of railroads, as necessary public utilities, is undeniably a matter of major public concern. Here, the interests of the public

[2] The doctrine of contemporaneous ownership under Rule 23.1 of the Federal Rules of Civil Procedure does not apply to a suit brought by a corporation itself to enforce its own rights. *Central Ry. Signal Co.* v. *Longden*, 194 F. 2d 310 (7th Cir. 1952); *Mauck* v. *Mading-Dugan Drug Company*, 361 F. Supp. 1314 (N.D. Ill. 1973). Here, after studying the Bureau of Accounts' report, the new directors of the Bangor & Aroostook authorized the chief executive officer of the railroad to institute suit in the carrier's own name.

and the railroad plaintiff largely overlap—and the "inchoate but real" public interest in viable railroads brings the facts of the present case well beyond the usual limits of the contemporary ownership rule.

The railroad brought the action in its own name, and if successful the proceeds will redound to the public interest.[3] Given these facts, it is respectfully submitted that the First Circuit acted properly in remanding the cause to the district court for a determination on its merits.

Respectfully submitted.

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[3] As the First Circuit pointed out (App. 25a), if the railroad prevails on the merits, the district court can call on the aid of state and federal agencies in insuring that the proceeds will not be unreasonably diverted to the private enrichment of the stockholders.

APPENDIX

Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2) provides in pertinent part:

> (2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
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> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier though ownership of its stock or otherwise; or

Section 5(3) of the Act, 49 U.S.C. § 5(3), provides in pertinent part:

> (3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20 (1) to (10), inclu-

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sive, of this part, sections 204(a) (1) and (2) and 220 of Part II, and section 313 of part III, (which relate to reports, accounts, and so forth, of carriers), and section 20a (2) to (11), inclusive, of this part, and section 214 of part II, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions.

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